

STATE OF MICHIGAN
DEPARTMENT OF LABOR AND ECONOMIC GROWTH
OFFICE OF FINANCIAL AND INSURANCE SERVICES
Before the Commissioner of Financial and Insurance Services

Office of Financial and Insurance Services,
Petitioner

v

Case No. 07-5433

Jason Terry,
Respondent

For the Petitioner:

Marlon F. Roberts (P68523)
Office of Financial and Insurance Services
611 W. Ottawa, 3rd Floor
Lansing, MI 48933

For the Respondent:

Howard T. Spence
Attorney at Law
1637 Willow Creek Drive
Lansing, MI 48909

Issued and entered
this 28th day of March 2008
by Ken Ross
Commissioner

FINAL DECISION

This case requires the Commissioner to determine the proper disposition of an insurance producer license that was issued to Respondent in June 2007.

Chapter 12 of the Michigan Insurance Code prohibits issuing an insurance producer license to any individual who has been convicted of a felony. Respondent was convicted of a felony in 2005. He disclosed the conviction when he applied for a license in June 2007. Despite the disclosure, Respondent was issued a producer license on June 28, 2007.

Office of Financial and Insurance Services (OFIS) staff, having discovered its error, initiated a compliance action in October 2007 to revoke the license. A complaint was issued and

OFIS staff filed a motion for summary decision asserting that the case presented no issue of material fact and that it was entitled, as a matter of law, to a decision revoking the license.

Respondent, represented by counsel, filed a brief in opposition to the staff's motion.

The OFIS insurance producer application form includes this question:

1. Have you ever been convicted of, or are you currently charged with, committing a crime, whether or not adjudication was withheld?

"Crime" includes a misdemeanor, felony or military offense. You may exclude misdemeanor traffic citations and juvenile offenses. "Convicted" includes, but is not limited to, having been found guilty by verdict of a judge or jury, having entered a plea of guilty or nolo contendere, or having been given probation, a suspended sentence or a fine.

If you answer yes, you must attach to this application:

- a) a written statement explaining the circumstances of each incident,
- b) a copy of the charging document, and
- c) a copy of the official document that demonstrates the resolution of the charges or any final judgment.

Respondent answered the question in the affirmative, submitted the required documents and provided the required written statement which read "was convicted May 5th 2005 3rd

DUI=/felony [sic] outcome 2 yr probation (Macomb County) currently on probation still owe \$100.00 to the courts." These responses should have resulted in the denial of a license.

Respondent has asserted that it is inappropriate to bring a motion for summary decision when there has been no hearing. This claim is without merit. It is appropriate to bring such a motion at any time, even before discovery or hearing. *American Community Mut. Ins. Co. v Commissioner of Ins.*, 195 Mich App 351, 362 (1992). If the motion is valid, it is because there is no need to conduct a hearing, there being no facts in dispute.

OFIS Hearing Rule 11 (R 500.2111) provides:

A party may move for a summary decision in the party's favor

upon any 1 of the following grounds:

- (a) The commissioner lacks jurisdiction over the person or the subject matter.
- (b) The opposing party has failed to state a claim upon which relief can be granted.
- (c) There is no genuine issue as to any material fact and the moving party is therefore entitled to a decision in that party's favor as a matter of law.

This hearing rule is similar to Rule 2.116 of the Michigan Rules of Civil Procedure.

When a motion for summary decision asserts that a case has no genuine issue of material fact, it is the moving party's burden to show that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. *Lepp v Cheboygan Area Schools*, 190 Mich App 726, 730 (1991). In support of the motion OFIS staff submitted the following documents:

1. (Exhibit A) Documents submitted by Respondent in connection with his insurance producer licensing application including a handwritten statement explaining his felony conviction, his order of probation issued by the Michigan 16th Judicial Circuit (Oakland County Circuit Court), and Judgment of Sentence issued July 31, 1995.
2. (Exhibit B) Respondent's application for a property and casualty insurance producer license dated March 22, 2007.
3. (Exhibit C) Computer screen record of Respondent's OFIS license record.
4. (Exhibit D) A copy of the Commissioner's May 2004 Final Decision in licensing case *Mazur v Office of Financial and Insurance Services* (Case No. 03-384-L; Docket No. 2003-1515).

In responding to a motion for summary disposition, the nonmoving party (in this case, the Respondent) must produce an affidavit or other documentary evidence that a genuine issue of

material fact does exist. *Star Steel Supply Co. v United States Fidelity & Guaranty Co.*, 186 Mich App 475, 480 (1990). Respondent did not provide that evidence in his response to Petitioner's motion. Respondent did assert that fact issues exist and then proceeded to make several legal arguments. His first argument is that he was not issued a license "in error" but that he "is presently in possession of a valid license to act as an insurance producer in the State of Michigan." Respondent Brief, page 5. However, Respondent's license cannot be considered "valid" if it was issued despite a statutory mandate that such licenses not be issued to individuals with felony convictions. That mandate is found in sections 1205 and 1239 of the Insurance Code.

Section 1205(1), MCL 500.1205(1), provides:

A person applying for a resident insurance producer license shall file with the commissioner the uniform application required by the commissioner and shall declare under penalty of refusal, suspension, or revocation of the license that the statements made in the application are true, correct, and complete to the best of the individual's knowledge and belief. An application for a resident insurer producer license shall not be approved unless the commissioner finds that the individual meets all of the following:

- (a) Is at least 18 years of age.
- (b) Has not committed any act that is a ground for denial, suspension, or revocation under section 1239.

Section 1239 provides:

(1) In addition to any other powers under this act, the commissioner may place on probation, suspend, revoke, or refuse to issue an insurance producer's license or may levy a civil fine under section 1244 or any combination of actions for any 1 or more of the following causes:

* * *

- (f) Having been convicted of a felony.

These provisions prohibit the Commissioner from issuing a producer's license to an individual who has been convicted of a felony. The Commissioner's commitment to this statutory mandate is found in the May 2004 final decision in *Mazur v Office of Financial and Insurance Services* (Case No. 03-384-L; Docket No. 2003-1515).

The licensing practices articulated in *Mazur* have been followed in each licensing decision other than those cited in the hearing record. Issuing insurance producer licenses to individuals with felony convictions in those cases constituted an error by the OFIS staff. When an error in licensing practices is discovered, the remedy is to correct the error, not to consider the error to be a precedent to be followed in subsequent cases. See the Commissioner's decision in the licensing appeal case *Judy Carey v OFIS* (Case No. 07-657-L, Docket No. 2007-603). The licensing practice of this agency remains that which is articulated in the *Mazur* decision.

Section 1205 is the controlling statutory mandate in cases where an insurance producer application discloses a past felony conviction. That section requires that a license not be granted in this case. Respondent has elected to characterize the present case as decision by one Commissioner to reverse the decision of a predecessor Commissioner as to the suitability of Respondent to act as a licensed insurance producer. This argument is disingenuous. The Commissioner in office when Respondent was licensed is the Commissioner who issued the *Mazur* decision which relied on sections 1205 and 1239 of the Insurance Code to rule that individuals with felony convictions are ineligible to receive producer licenses. There has never been any disagreement on that point between Commissioners.

Respondent has argued that whenever the Commissioner seeks to revoke a license, the controlling statute is section 1200 of the Insurance Code (MCL 500.1200) which provides that the “good moral character act” applies to determinations made under chapter 12 of the Insurance Code. In fact, section 1200 of the Insurance Code simply indicates where the definition of “good moral character” may be found in the Michigan Compiled laws. The only actual reference to “good moral character” in chapter 12 of the Insurance Code is in reference to licensing solicitors (section 1214), adjusters (section 1224), and insurance counselors (section 1234). Good moral character is not referenced in any licensing provision related to insurance producers. This has been the case since the enactment of Public Act 228 of 2001 which introduced the licensing standards of section 1205 and 1239 and which removed the Commissioner’s discretion in issuing licenses to individuals with felony convictions.

For the reasons cited above, the Motion for Summary Decision is granted.

ORDER

Therefore, it is ORDERED that the Respondent’s insurance producer license is revoked.